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No. 92-69

IN THE

Supreme Court of the United States

OCTOBER TERM, 1992

ICELEAN CLARK, *et al.*,
Petitioners,
v.
KALIMA JENKINS, *et al.*,
Respondents,
v.
STATE OF MISSOURI, *et al.*,
Respondents,
and
SCHOOL DISTRICT OF KANSAS CITY, MISSOURI, *et al.*,
Respondents.

BRIEF OF RESPONDENTS STATE OF MISSOURI, ET AL., IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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COUNTERSTATEMENT OF QUESTIONS PRESENTED

1. Whether the lower courts properly applied Missouri law and this Court's decision in *McKesson Corp. v. Division of Alcoholic Beverages & Tobacco*, 496 U.S. 18 (1990) to deny refunds to taxpayers who failed to follow a state protest procedure to protect their right to a refund of a tax subsequently held invalid?

2. Whether the lower courts correctly found as a fact that the School District of Kansas City, Missouri followed procedures approved by this Court in *Missouri v. Jenkins*, 495 U.S. 33 (1990) in setting a levy increase in 1988 to provide funds for the school desegregation remedy in this case?

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COUNTERSTATEMENT OF THE CASE

The petition for certiorari relates to an issue in the Kansas City, Missouri school desegregation case which has previously been the subject of an opinion of this Court. *Missouri v. Jenkins*, 495 U.S. 33 (1990).

In order to fund the School District of Kansas City, Missouri's ("KCMSD") share of the costs of the remedy in the case, the district court ordered an increase in the property taxes paid by the residents of the KCMSD. *Jenkins v. Missouri,* 672 F.Supp. 400 (W.D. Mo. 1987). This increase was ordered on September 15, 1987. At the time this increase was ordered, the Petitioner's attorneys, Landmark Legal Foundation ("Landmark") publicized the availability of procedures to challenge that portion of the tax levy which was intended to pay part of the KCMSD's desegregation costs. Pet. App. A9. The procedures which Landmark publicized were those set out in Mo. Rev. Stat. 139.031 (Supp. 1987) (amended 1989) which establishes the method for paying taxes under protest and perfecting an appeal to the circuit court (the State trial courts in Missouri). The statute is to be used to pay under protest and seek judicial review of "any taxes" not due to the State's Director of Revenue. Mo. Rev. Stat. § 139.031(1)[1]. Pursuant to the terms of the statute, large numbers of taxpayers protested the portion of their school levies which was intended to pay desegregation costs.[2]

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[1] The property taxes at issue here were not due to the State's Director of Revenue, but rather to the county which contained the KCMSD.

[2] According to the petitioners:

> Some 9,000 KCMSD taxpayers . . . paid a total of $10,695,197 of this [1987] levy increase 'under protest,' citing Mo. Rev. Stat. Section 139.031.

Pet. 4, n. 4.

The petitioners also assert that 10,000 taxpayers paid $9,379,400 of the 1988 taxes under protest. *Id.* at 6, fn. 5. Petitioners further asserted below that approximately 18,500 taxpayers paid $13,790,627 of the 1989 taxes under protest "pursuant to RSMo. § 139.031." Brief for Appellants, *Jenkins v. Clark,* No. 90-2977 WMKC, pg. 6, fn. 4.

The protested funds were escrowed according to State law. Mo. Rev. Stat. § 139.031.

In its August 19, 1988 opinion, the Eighth Circuit Court of Appeals affirmed the property tax increase but instructed the district court to modify the future method of obtaining desegregation funding. The Court of Appeals instructed the district court to refrain from directly setting the levy, but rather to authorize the KCMSD to adopt a levy. The district court's role would be "limited solely to establishing the maximum limit and enjoining enforcement of those provisions of Missouri law that prevent KCMSD from raising the money to remedy the constitutional violations." *Jenkins v. Missouri*, 855 F.2d 1295, 1314 (8th Cir. 1988).

This Court affirmed the modified procedures set forth by the Court of Appeals, but held that the Court of Appeals should not have allowed the district court's direct imposition of the increase to stand. *Missouri v. Jenkins*, 495 U.S. 33, 52 (1990). This Court did not specify the consequences of its holdings for the 1987 taxes in its opinion. Rather, it remanded to the Court of Appeals for further proceedings consistent with its opinion. *Id.* at 58.

Before discussing the events occurring after this Court's 1990 decision in this case, it is important to focus on certain events which occurred between the time of the Court of Appeals' August 19, 1988 opinion and this Court's April 18, 1990 opinion as the second issue raised in the petition implicates these events. At a meeting on September 13, 1988, the KCMSD Board voted indicating it would set its levy at the rate of $4.23 per $100 of assessed valuation. It further determined, however, that if the district court did not rule on its request by October 11, 1988, which was the deadline for issuance of 1988 property tax bills (for the 1988-89 school year), the Board would set the levy at $4.00 per $100 assessed valuation, thereby not exceeding the rate previously deemed to be reasonable by the district court. The KCMSD filed a motion in the district court on September 22, 1988 indicating their proposed course of action.

Because the Eighth Circuit's mandate from its August 19, 1988 opinion had not yet been issued, the KCMSD Board proceeded on October 11, 1988 to approve a $4.00 levy. The Court of Appeals' mandate, issued three days later, fully effectuated the Eighth Circuit decision on modified taxing procedures. After a hearing in December, 1988, which was publicized within the Kansas City metropolitan area and during which members of the general public and Landmark counsel spoke, the district court ruled on January 3, 1989 that the property tax should remain at $4.00, because the bills had already been sent to the taxpayers.[3]

After this Court's opinion in *Missouri v. Jenkins* validating the property tax increase except for that portion directly ordered by the federal district judge, the State respondents moved in the district court for an order directing that the tax funds which had been escrowed in 1988 and 1989 pursuant to the State protest procedures in Mo. Rev. Stat. § 139.031 be released and paid to the State to satisfy certain desegregation related debts owed by the KCMSD to the State. The Jenkins class plaintiffs and the KCMSD generally did not oppose the State's motion (on the condition that they wished to preserve their appeal rights as to the decisions which had created some of the debts of the school district to the State). Thereafter, the petitioners sought intervention and filed a motion seeking refunds of all 1987 and 1988 taxes, whether paid under protest pursuant to the statutory procedure or not.

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[3] In that same order, the district court declined to issue a ruling as to an appropriate levy for 1989 (for the 1989-90 school year). On August 22, 1989, the KCMSD Board again adopted a proposed tax levy rate of $4.00 per $100 of assessed valuation, and filed a motion with the district court seeking recognition of that rate as a reasonable maximum. The district court approved $4.00 as a maximum in light of the KCMSD Board's approval of such a rate, as well as the parties' agreement that such a rate was reasonable pending a ruling from this Court which had granted, in part, a petition for writ of certiorari to consider the issue. Pet. App. A28.

Consistent with this Court's ruling and the Missouri statutory protest procedure, the district court denied the petitioners' motion for a refund of the property taxes collected other than the taxes protested in 1987. It agreed with the arguments of the respondents that this Court's holding in *McKesson Corp. v. Division of Alcoholic Beverages & Tobacco*, 496 U.S. 18 (1990) permits the retention of taxes previously collected which have been declared unconstitutional, as long as a protest procedure has been made available. Pet. App. A17. It held that the Missouri protest statute applied to the tax regardless of the fact that the 1987 levy increase was ordered by the district court, because the statute allows the protest of "any taxes." Pet. App. A18. It also found that the KCMSD Board itself, and not the district court, set the 1988 levy in accordance with the modified procedures approved by both the Eighth Circuit and this Court. *Id.* at A18. The district court ordered the escrowed funds released to the State.

The petitioners appealed the district court's order to the United States Court of Appeals for the Eighth Circuit. That court affirmed the district court's order. The Court of Appeals rejected the intervenors' argument that the State procedures did not apply to the 1987 levy, concluded that such refund requests were subject to the protest requirement, Pet. App. A7, and that requiring compliance with the protest procedures did not violate due process. *Id.* at A9. On the issues regarding the 1988 levy the Court of Appeals agreed with the district court that the 1988 levy had been lawfully set by the KCMSD Board. *Id.* at A10.

REASONS FOR DENYING THE WRIT

The petition of Icelean Clark, et al., is not worthy of this Court's further consideration because the carefully considered opinion of the United States Court of Appeals for the Eighth Circuit, affirming the district court, is plainly correct on every argument raised by the Petitioners.– This Court has already decided the refund issue raised by the Petitioners in *McKesson* and there is no reason to reconsider the matter two years later. The fact-bound question of whether the KCMSD set its own levy in 1988 was also examined in detail by both the lower courts and need not be considered further.[4]

I. THE PETITION FOR WRIT OF CERTIORARI SHOULD BE DENIED BECAUSE THE DECISION OF THE COURT OF APPEALS IS CORRECT.

The decision of the United States Court of Appeals for the Eighth Circuit is correct with regard to both of the questions raised by the petition. The Eighth Circuit properly applied this Court's decision in *McKesson*, to the property taxpayers who failed to protest the collection of property taxes under that portion of the district court's remedial order which was reversed by this Court in *Missouri v. Jenkins*, 495 U.S. 33 (1990). Both of the lower courts also correctly interpreted this Court's 1990 decision in *Missouri v. Jenkins* when they found that in 1988 the KCMSD itself set the property tax levy which was collected for the 1988-89 school year.

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[4]While the State and the other respondents, KCMSD, the Jenkins Plaintiffs and the AFT Local 691, have generally disagreed on most issues in this litigation, see, e.g., *Missouri v. Jenkins*, these parties are in the unusual position of being in agreement on the proper resolution of the issues raised by the petition.

A. The Decisions of the Lower Courts are Correct According to Missouri Law and this Court's Decision in *McKesson Corp. v. Division of Alcoholic Beverages and Tobacco*, 496 U.S. 18 (1990).

In declining to order refunds of all taxes paid due to the levy increases necessitated by the desegregation remedy, except for those paid under protest in 1987, both the district court and the Eighth Circuit correctly applied Missouri law and this Court's decision in *McKesson*, which recognizes the validity of State provisions requiring that taxes be paid under protest in order to preserve a right to a refund in the event the tax is later invalidated. As the Court of Appeals properly ruled, Pet. App. A7-8, *McKesson* makes clear that, as a matter of sound policy, even when a tax is unconstitutionally imposed, a state may limit refunds solely to those taxpayers who paid under protest. As this Court stated in *McKesson*, the commands of the due process clause are sufficiently flexible to allow states to impose limitations on the refund of even unconstitutional taxes because of State government's strong interest in financial stability:

> *The State might, for example, provide by statute that refunds will be available only to those taxpayers paying under protest* or providing some other timely notice of complaint; execute any refunds on a reasonable installment basis; enforce relatively short statutes of limitation applicable to such actions; refrain from collecting taxes pursuant to a scheme that has been declared invalid by a court or other competent tribunal pending further review of such declaration on appeal; *and/or place challenged tax payments into an escrow account* or employ other accounting devices such that the State can predict with greater accuracy the availability of undisputed treasury funds.

496 U.S. at 55 (footnote omitted) (emphasis added).

Needless to say, any sudden and unexpected order to refund millions of dollars would impact on other programs and services provided by the State. This is the type of unexpected fiscal trauma *McKesson* guarded against with its approval of protest requirements for taxes subsequently held invalid. Of the three categories of tax payments sought, the 1987 unprotested taxes, the 1988 protested taxes, and the 1988 unprotested taxes, only as to the 1988 protested funds had the State been on notice that there was a question as to whether these funds would be available to the State treasury, and that is by far the smallest of the three categories.

Missouri law requires that persons seeking to challenge property taxes pay their taxes under protest and perfect an appeal to the circuit court. Mo. Rev. Stat. § 139.031.2, states in relevant part:

> [E]very taxpayer protesting the payment of taxes shall, within 90 days after filing his protest, commence an action against the collector by filing a petition for the recovery of the amount protested in the circuit court of the county in which the collector maintains his office. If any taxpayer so protesting his taxes shall fail to commence an action in the circuit court for the recovery of the taxes protested within the time prescribed in this subsection, such protest shall become null and void and of no effect, and the collector shall then disburse to the proper official the taxes impounded . . .

The Missouri courts have held that a taxpayer who fails to follow the statutory procedure for filing and perfecting the protest thereby loses the opportunity to obtain a refund of the invalidly collected tax. See *B & D Investment Company v. Schneider*, 636 S.W.2d 759, 763-64 (Mo. 1983) (taxpayer's failure to comply with the statute requiring property owner to file written statement with collector protesting all or any part of taxes paid

precluded recovery of taxes paid pursuant to invalid increase in assessed valuation); *Adcor Realty v. State Tax Commission*, 627 S.W.2d 604, 606 (Mo. 1982) (Missouri Supreme Court affirmed dismissal of appeal to State Tax Commission on ground that the appeal was moot because taxpayer had lost his right to refund by failing to pay taxes under protest); *Xerox Corp. v. Travers*, 529 S.W.2d 418, 422 (Mo. 1975) (failure to follow statutorily-required procedure for payment under protest results in loss of statutorily-created right to refund of amount protested).

In this respect, Missouri law differs from the Florida law at issue in *McKesson*. As the district court stated in its opinion, this Court noted in *McKesson* that "Florida law does not require a taxpayer to pay under protest in order to preserve the right to challenge a remittance in a post-payment refund action." *McKesson*, 496 U.S. at 24, n. 4; Pet. App. A16. That was one reason why this Court reversed the Florida Supreme Court's refusal to order a refund of the invalid tax at issue there. But this Court's reversal in *McKesson* has no implication because of Missouri's protest requirements, which were specifically approved in *McKesson* as a way to avoid a full refund of an invalid tax.

The Petitioners do not argue that the Missouri protest procedure is invalid or that *McKesson* would not operate to validate it, admitting in their reply brief below that if the tax increase billed and paid pursuant to the district court's September 15, 1987 order is treated for refund purposes as a property tax levied by a local taxing authority, the Missouri statutory property tax protest scheme would apply and those taxpayers who did not comply with the State protest requirement of Mo. Rev. Stat. § 139.031 would not be entitled to a refund. See Reply Brief of Appellants, *Jenkins v. Clark*, No. 90-2977 WMKC (8th Cir.), pg. 1. Instead, Petitioners attempt to distinguish *McKesson* and the Missouri cases by arguing that the tax in question is federal and therefore the Missouri protest statute does not apply. Far from being a

judicial levy or a federal tax levied by a federal court, as this Court has recognized the property tax ordered by the district court invoked the traditional property tax mechanism provided by State law. *Missouri v. Jenkins*, 495 U.S. at 57 ("it is . . . clear that a local government with taxing authority may be ordered to levy taxes in excess of the limit set by state statute where there is reason based in the Constitution for not observing the statutory limitation.") This Court did not hold that the district court had created a new tax in increasing the property tax levy.[5] Rather, this Court concluded the district court had erred in the procedure it invoked to effect the tax increase at issue and that the Eighth Circuit's modification to that procedure, requiring the KCMSD to set the levy itself, was constitutionally acceptable.

As the Court of Appeals noted:

> While the district court did order the levy increase, the levy was nevertheless in all other ways treated as an ordinary state property tax. The district court did not purport to be creating a new type of tax, but merely augmenting the existing KCMSD property tax. 672 F. Supp at 413. It was billed by the county tax authorities and paid to those authorities for the benefit of the State school district. In fact, the intervenors' brief refers to the levy several times as a 'property tax.'

Pet. App. A7. Indeed the fact that the property tax increase was merely an augmentation of a traditional method of school financing in Missouri was key to the Eighth Circuit's approval of the concept of funding some desegregation costs through the modi-

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[5] The petition cites frequently to the concurring opinion in *Missouri v. Jenkins*. *See*, e.g., Pet. 13. While the State Respondents might agree with much of what is said in the concurring opinion in *Missouri v. Jenkins*, particularly on the issues relating to the overall desegregation remedy, and indeed argued against the holding in *Missouri v. Jenkins*, the views of the concurrence did not command a majority of the Court.

fied procedures it adopted, requiring the Board to set the levy. In the same opinion, it struck down the district court's creation of a new mechanism for funding school operations requiring an entirely new collection process, through an income tax surcharge. *Jenkins*, 855 F.2d at 1315-16.

By its precise terms, the Missouri protest statute applies to any taxes not to be paid to the State's Director of Revenue, and therefore applies here, as tens of thousands of Missouri taxpayers recognized by invoking this protest mechanism in 1987 and subsequent tax years. As was developed in the district court record and as Petitioners acknowledge, Pet. 4, n. 4, and Pet. 6, n. 5, these sums protested reflect protests by approximately 9,000 taxpayers in 1987-88, 10,000 taxpayers in 1988-89, and 18,500 taxpayers in 1989-90.[6] Since even some of the petitioners availed themselves of the state statutory protest mechanism to protect their rights to refunds, their contention that the protest provision is inapplicable cannot be sustained. Further, the many protests of the September 15, 1987 tax under the Missouri statute were effective to preserve the taxpayers' rights to a refund, which they would not have been if the tax was something other than an augmentation of an existing tax. Taxpayers used the state procedures to perfect their protests for three years, and for many millions of dollars. As such, the district court's increase was merely an increase in an existing local property tax, which is an established method for obtaining revenue to operate public schools.[7]

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[6] By itself, the number of protests that have been reported should dispense with the Petitioners' contention that the Missouri protest statute is "arcane." Pet. 8.

[7] Petitioners open Section I of their petition arguing that "individuals and businesses forced to pay an unlawful tax against their will are entitled to a full refund," Pet. 9. They cite a number of cases which are not relevant at all to this issue. These precedents are erroneously relied upon by the Petitioner as the Respondents have pointed out in the courts below, and do not support the

(Footnote 7 continued on next page)

The Petitioners also advance certain general arguments in apparent support of their contention that fundamental principles of due process mandate the refund of all of the 1987 taxes. When the broad generalities are laid aside, it appears the only substantive assertion that is made is that taxpayers were provided inadequate notice, and as a result were deprived of a meaningful opportunity to challenge the tax. As the Court of Appeals properly noted, Pet. App A9, this Court has effectively disposed of the Petitioner's notice arguments:

> All persons are charged with knowledge of the provisions of statutes and must take note of the procedure adopted by them . . . this is especially the case with respect to those statutes relating to taxation or condemnation of land.

Texaco Inc. v. Short, 454 U.S. 516, 532, fn. 25 (1982) (quoting *North Laramie Land Company v. Hoffman*, 268 U.S. 267, 283 (1925)); *Accord Atkins v. Parker*, 472 U.S. 115, 130 (1985). This argument is also effectively rebutted by the fact that many thousands of taxpayers protested the 1987, 1988 and 1989 property tax levies as Missouri law requires. The Petitioners had

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(Footnote 7 continued)

proposition for which they are cited. For example, *Solem v. Stumes*, 465 U.S. 638 (1984) was a criminal procedure case. The issue there was whether the standards of police conduct announced by this Court in *Edwards v. Arizona*, 451 U.S. 477 (1981), holding that once a suspect has invoked the right to counsel, any subsequent conversation must be initiated by him, should be applied retroactively. This Court said it should not be. Similarly, *United States v. Estate of Donnelly*, 397 U.S. 286 (1970) and *Chicot County Drainage District v. Baxter State Bank*, 308 U.S. 371 (1940) have nothing to do with refunds of taxes. In fact, *Chicot County* discussed a situation tending to support a position which would be contrary to that presented by the Petitioners, where decrees made under a statute later found to be unconstitutional are allowed to remain in force. The case of *Norton v. Shelby County*, 118 U.S. 445 (1886) also has no apparent relevance. It did not concern the issue of whether an illegal tax should be refunded, but rather, whether a county bond issue was valid and the distinction between *de jure* and *de facto* officers.

ample opportunity to substantiate their claims as to inadequate notice in the district court and failed to do so. Moreover, as the Court of Appeals also noted in its opinion, Petitioners themselves sought to publicize the availability of the State protest process, and did so. Pet. App A9.

The dearth of support in the law for the Petitioners' arguments leads them to make obvious emotional appeals to this Court. See Pet. A17. This Court should reject that effort as it is no basis for exercise of its certiorari jurisdiction.

Therefore, under the Supreme Court's holding in *McKesson* and other decisions of this Court relating to notice, the Petitioners' contentions cannot be sustained, and Petitioners present no valid basis for review of the holding in *McKesson*.

B. The Record and the Findings of Fact by the District Court, Affirmed by the Court of Appeals, Demonstrate that the Property Tax Levy Set in 1988 Was Set by the School Board Pursuant to Procedures Approved by This Court.

As this Court has stated, the Court of Appeals' August 19, 1988 decision in *Jenkins v. Missouri*, 855 F.2d 1295 (8th Cir. 1988) approved a procedure by which the district court would authorize the KCMSD to submit a levy to the State tax collection authorities, establish a reasonable maximum and enjoin the operation of any state laws that would limit or reduce the levy below the amount set by KCMSD. *Missouri v. Jenkins*, 495 U.S. at 52. The district court found that the property taxes for 1988-89 "were collected lawfully in accordance with the Eighth Circuit's modified procedure." Pet App. A21. The district court found that the KCMSD followed the essential elements of the "modified procedure approved by the Eighth Circuit and affirmed by the Supreme Court." Pet. App. A21. The district court then concluded this Court's mandate was satisfied because it was

the Board of Education for the KCMSD which itself set the 1988 levy on October 11, 1988. Pet. App. A21. In an order dated January 3, 1989, the district court indicated it had "tacitly approved as reasonable the Board's action at its October 11, 1988 meeting to set the levy at $4.00." Pet. App. A20. The Eighth Circuit approved the district court's findings on the issue of the KCMSD setting the 1988 levy. Pet. App. A9-10.

As both the district court and the Court of Appeals correctly noted, the proper focus is on what action the KCMSD took rather than on the technical question of the appellate mandate and when it took effect. Pet. App. at A10, A21. This Court indicated that allowing the KCMSD itself to adopt a tax increase was the critical factor in defining "[t]he difference between the two approaches" — direct judicial imposition of a tax and judicial authorization of the KCMSD to do so. *Missouri v. Jenkins*, 495 U.S. at 51. A district court order approving a levy set by the KCMSD Board was necessary only "because the Court of Appeals had required it to establish a maximum for the levy." *Id.* at 52, fn. 18.

On October 11, 1988, the KCMSD Board adopted, through its own action, a $4.00 levy for 1988, three days before October 14, 1988 when the Court of Appeals' mandate from its August 19, 1988 opinion was issued. The District had filed a motion for approval of a $4.23 property tax levy rate in the district court, indicating that if the new levy was not approved by the district court prior to the deadline for mailing the full 1988 tax bills, the Board would adopt a levy of $4.00, thereby not exceeding the previously approved rate. When the district court did not issue a ruling prior to the date set forth in the KCMSD's motion, the School Board adopted a levy of $4.00 and submitted that levy to the taxing authorities. No party objected to the Board's action. If the district court's invalid September 15, 1987 tax increase order remained in effect, it would not have been necessary to the Board to act at all on the levy. The local tax collection authorities

of Jackson County and the State were well aware they could take no action to prevent the increase pursuant to the Eighth Circuit's August 19, 1988 opinion. The $4.00 levy set by the KCMSD for 1988 used the district court's September 15, 1987 order not as an authority that the Board felt compelled to use, but rather as a reference for a levy rate which the Court had already found reasonable and to which no party would object in light of its consistency with the district court's previous order. The district court also ruled in October of 1990 that its January 3, 1989 order "tacitly approved as reasonable the Board's action at its October 11, 1988 meeting to set the levy at $4.00," Pet. App. A20, and this ruling was noted with approval by the Court of Appeals in its opinion. Pet. App. A10.

Despite the fact that the mandate had not issued, the district court and the parties understood in August, 1988 when the Court of Appeals issued its ruling regarding the remedy and the tax issues, that the Board had to set the levy for 1988 and all proceeded on the basis of that knowledge. Moreover, while the fact that the Court of Appeals' mandate did not issue before October 11, 1988 may have prevented KCMSD from obtaining district court approval for the higher levy that it preferred, it defies reason to argue that the absence of the mandate prevented the Board from setting its own levy, and submitting it to the collection authorities.

The Petitioners' attempt to stretch a single "s" in a footnote into a factual finding by this Court regarding how the 1988-89 levy was set cannot be countenanced. Pet. 20, quoting *Missouri v. Jenkins*, 495 U.S. at 52, fn. 18. This argument ignores the fact that this Court's partial reversal of the Court of Appeals and its remand instructions did not reflect such a specific finding. *Id.* at 51-52, 58. Petitioner's argument also fails to take into account this Court's approach to the remand in this case was consistent with its observations that "[w]hen we have held state taxes unconstitutional in the past, it has been our practice to abstain

from deciding the remedial effects of such a holding." *American Trucking Association v. Smith*, 496 U.S. 167, 176 (1990). The reason for this practice is "considerations of federal-state comity." *Id.* Further, the purpose of the footnote in question was not to resolve such factual issues. Rather, it seems plain this Court intended to establish that the Court of Appeals' ruling upholding "future" tax levy increases implemented according to modified procedures, and thus this Court's affirmance of such procedures, "was not dictum." 495 U.S. at 52.[8]

Therefore, the Court of Appeals' opinion concerning the actions of KCMSD and the district court regarding the 1988 levy was correct on the merits.

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[8] Petitioners mischaracterize other language from the same opinion relating to the same issue. In discussing the district court's January 3, 1989 order, this Court stated without declaring the consequences thereof, if any, that in the January 3, 1989 order the district court "took no action to reverse its tax increase through fiscal year 1988-89." 495 U.S. at 52, fn. 18. This Court stated further that in that same order the district court specifically acknowledged KCMSD's responsibility for setting the tax levy for the next school year, 1989-90. Thus, this Court concluded the district court itself had recognized that the Court of Appeals' August 19, 1988 ruling regarding future tax increases was not dictum. This Court never said, however, as Petitioners suggest, that it specifically held the district court's tax increase order invalid through fiscal year 1988-89. Pet. 19.

CONCLUSION

Petitioners have shown no basis for review by this Court. The petition for a writ of certiorari should be denied.

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